STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM LEE LATHROP,

Defendant-Appellant.

UNPUBLISHED
August 21, 2007

No. 268152
Muskegon Circuit Court
LC No. 05-051910-FC

Before: Bandstra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83. The trial court sentenced defendant to 20 to 35 years in prison. He appeals his sentence as of right. We affirm.

During a verbal argument outside their home, defendant punched his wife Amy in the face and then dragged her into the house. He then stabbed her several times in the chest with a kitchen knife. Defendant's daughter, Becky Lathrop, witnessed the stabbing. Becky stated that she hit, pulled, and pushed defendant in an attempt to stop the attack. She recalled that on at least two occasions, defendant stumbled away from Amy, but that he then immediately continued the stabbing.

Following his jury trial, defendant was convicted of one count of assault with intent to commit murder. The recommended minimum sentence range under the legislative sentencing guidelines, as calculated at the time of defendant's sentencing, was 126 to 210 months in prison. The trial court exceeded the guidelines and sentenced defendant to 20 to 35 years (240 to 420 months) in prison. Following sentencing, defendant filed a motion to remand pursuant to MCR 7.211(C)(1), which this Court denied. *People v Lathrop*, unpublished order of the Court of Appeals, entered October 5, 2006 (Docket No. 268152).

We begin by noting that defendant does not challenge on appeal the trial court's decision, itself, to upwardly depart from the sentencing guidelines. We therefore decline to address the upward departure from the sentencing guidelines in this case, which has not been presented for our review. See *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Instead, defendant argues on appeal that the trial court erred in scoring prior record variable (PRV) 5, MCL 777.55, and offense variable (OV) 12, MCL 777.42.

The imposition of a sentence is reviewed for an abuse of discretion. *People v Sexton*, 250 Mich App 211, 227; 646 NW2d 875 (2002). Additionally, the "sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v James*, 267 Mich App 675, 678; 705 NW2d 724 (2005). An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). The trial court's factual findings at sentencing are reviewed for clear error. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). The interpretation of the statutory sentencing guidelines and the legal questions presented by application of the guidelines are subject to de novo review. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002).

Defendant first claims on appeal, and the prosecution concedes, that PRV 5 was improperly scored at two points. PRV 5 may be scored at two points if the offender has one prior misdemeanor conviction or prior misdemeanor juvenile adjudication. MCL 777.55(e). However, in scoring PRV 5, the trial court may not consider "any conviction or juvenile adjudication that precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication." MCL 777.50(1). Review of the record reveals that defendant's most recent offense was in 1988, approximately 17 years before the commission of the instant offense. Based on this information, we agree that defendant should have received zero points for PRV 5.

However, contrary to defendant's argument on appeal, he is not entitled to resentencing based on this scoring error. Improper scoring does not warrant resentencing where the trial court would have imposed the same sentence regardless of the error. *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003); *People v Hicks*, 259 Mich App 518, 537 n 8; 675 NW2d 599 (2003). While rescoring PRV 5 at zero points would result in a lower recommended minimum sentence range under the legislative guidelines, the trial court departed upwardly from the sentencing guidelines without regard for whether the guidelines were improperly scored. The trial court articulated several reasons for its departure, and there is no evidence that it relied on defendant's prior criminal record in imposing the sentence. In fact, comments made by the trial court at sentencing reveal that the trial court did not rely on defendant's past crimes, finding that they were not "real severe" and were "far in the past." Moreover, we reiterate that defendant does not challenge the trial court's decision, itself, to upwardly depart from the sentencing guidelines. Because the trial court would have imposed the same sentence regardless of the scoring error, the error in scoring PRV 5 does not warrant resentencing. *Mutchie*, *supra* at 51-52.

Defendant also claims on appeal that OV 12 was incorrectly scored at 25 points. Twenty-five points may be scored for OV 12 when the defendant commits three or more contemporaneous felonious criminal acts involving crimes against a person. MCL 777.42(1)(a). Defendant claims that, because he stabbed Amy in a continuous sequence, convicting him of multiple counts of assault with intent to commit murder would have violated constitutional protections against double jeopardy. US Const, Am V.

Defendant used one weapon to stab Amy multiple times. The stabbings were continuous except for two occasions when defendant's daughter intervened by pushing or pulling defendant, causing him to stumble away from Amy's body. Defendant continued to stab Amy immediately

after stumbling away. While we note that there is no violation of double jeopardy if one crime is complete before the other takes place, *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995), we agree with defendant that the protection against double jeopardy would have prevented the contemporaneous stabbings in this case from resulting in three separate convictions. In *People v Wakeford*, 418 Mich 95, 111-112; 341 NW2d 68 (1983), our Supreme Court indicated that the "primary purpose of the [armed robbery] statute is the protection of persons," and that the appropriate unit of prosecution for armed robbery is therefore the person robbed. Similar to the statute discussed in *Wakeford*, the primary objective of the assault-with-intent-to-commit-murder statute is the protection of persons. See, e.g., *People v Harrington*, 194 Mich App 424, 429; 487 NW2d 479 (1992) (the primary objective of the assault-with-intent-to-do-great-bodily-harm-less-than-murder statute is "punishing crimes injurious to other people"). Therefore, the appropriate unit of prosecution for assault with intent to commit murder is necessarily the person assaulted. Defendant's continuous act of stabbing his wife in this case would have supported only one conviction of assault with intent to commit murder because only one person was actually assaulted. See *Wakeford*, *supra*.

Even though defendant's acts could not have supported three separate convictions, however, we are not prepared to say that the trial court erred in scoring OV 12. Under OV 12, "a felonious criminal act is contemporaneous" if "the act occurred within 24 hours of the sentencing offense" and "the act *has not and will not* result in a separate conviction." MCL 777.42(2)(a) (emphasis added). Thus, according to the plain language of MCL 777.42(2)(a), the fact that defendant's acts could not have supported three separate convictions is irrelevant to whether those acts can be considered "contemporaneous felonious criminal acts" for purposes of OV 12. Given this language contained in MCL 777.42, we cannot conclude that the trial court necessarily erred in scoring OV 12.

Moreover, even assuming arguendo that OV 12 was erroneously scored, defendant cannot establish that the error had any affect on his actual sentence. The rescoring of OV 12 alone would not change the recommended minimum sentence range under the legislative guidelines. Furthermore, the trial court departed upwardly from the sentencing guidelines, and based its departure not on the technical number of assaults committed, but rather on the gruesome nature of the crime and the effect of defendant's actions on his family. It is therefore apparent that the trial court would have imposed the same sentence regardless of the particular score assigned to defendant under OV 12. Accordingly, any improper scoring of OV 12 in this case does not warrant resentencing. *Mutchie*, *supra* at 51-52.

Affirmed.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen